

² The Board notes that OWCP received additional evidence following the August 23, 2019 decision. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective September 15, 2019, based on her capacity to earn wages in the constructed position of appointment clerk.

FACTUAL HISTORY

On October 23, 2014 appellant, then a 30-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on October 17, 2014 she heard something pop in the middle part of her right leg when she stood up too fast after bending down to empty a foley bag while in the performance of duty. She was placed on sedentary modified work. OWCP accepted the claim for right knee unspecified site sprain, and subsequently expanded acceptance of the claim to include deep vein thrombosis of right leg popliteal vein. It paid appellant wage-loss compensation on the supplemental rolls as of December 3, 2014 and on the periodic rolls as of January 8, 2017.³

In a February 22, 2017 work capacity evaluation (Form OWCP-5c), Dr. Babatola Durojaiye, a physician specializing in internal medicine, indicated that appellant was permanently disabled from any type of work.

On September 5, 2017 OWCP referred appellant, together with a statement of accepted facts (SOAF), medical records, and list of questions, to Dr. Eniola Owi, a Board-certified occupational medicine physician, for a second opinion evaluation to determine the extent of appellant's accepted employment injury and work capacity.

In an October 12, 2017 report, Dr. Owi, based on a review of the SOAF, history of injury, and medical treatment and physical examination, concluded that appellant was capable of working with restrictions. She diagnosed resolved right knee unspecified site sprain and right leg deep vein thrombosis of the popliteal vein. On examination Dr. Owi found appellant had right leg swelling when compared with the left leg, nontender right knee and thigh, no effusion, tender distal foreleg half, 1+ pitting edema in the distal foreleg, hyperpigmentation, and tenderness above right medial malleolus, normal bilateral knee strength. A review of a March 29, 2017 popliteal vein ultrasound showed right common femoral vein to right popliteal vein nonocclusive thrombosis. Dr. Owi concluded that, due to swelling of appellant's right leg, prolonged standing, and walking should be avoided. In an attached Form OWCP-5c, she found appellant capable of working with restrictions that included up to 6 hours of sitting, up to 1 hour of walking, standing, bending/stooping, and operating a motor vehicle at work, up to 40 pounds of pushing for 1 hour, up to 20 pounds of pulling for 1 hour, up to 20 pounds of lifting for 6 hours, no squatting, kneeling, or climbing, and 5-minute breaks every 30 minutes.

On March 12, 2018 OWCP, based on Dr. Owi's report, referred appellant for vocational rehabilitation services.

³ Appellant was a probationary employee at the time of the accepted October 17, 2014 employment injury. The employing establishment terminated appellant's employment, effective July 8, 2015, due to her failure to maintain a regular work schedule.

On October 29, 2018 appellant's vocational rehabilitation counselor determined that she was capable of working as a customer service representative or customer (order) clerk or appointment clerk and that state labor market surveys on that date showed that these positions were reasonably available in appellant's commuting area. The appointment clerk position, under the Department of Labor, *Director of Occupational Titles* (DOT) #237.367-010, was characterized as sedentary in nature and involved such duties as scheduling appointments with employer or other employees for customers or clients by telephone, mail, or in person, recording time and date of appointment in an appointment book, noting when appointments have been filled or cancelled, operating a switchboard, receiving payments for services performed and recording them in a ledger, and writing or telephoning clients to remind them of appointments.⁴ The vocational rehabilitation counselor indicated that appellant met the specific vocational preparation (SVP) for the position based on reported work experiences and transferrable work skill. On November 5, 2018 she recommended online computer courses for further training in administrative assistant fundamentals and Microsoft Word 2016 at the University of Georgia.

Appellant took short-term online training in basic Windows, Microsoft Office, and Word to update her computer and typing skills from November 14, 2018 through January 4, 2019. Shortly thereafter, OWCP provided her with 90 days of job placement assistance from January 7 through April 7, 2019.

On March 14, 2019 OWCP referred appellant, together with a SOAF, medical record, and list of questions, to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for an assessment of her employment-related conditions, extent of disability, and appropriate treatment. In an April 5, 2019 report, Dr. Dinenberg provided examination findings and reviewed appellant's medical record. He opined that appellant's right knee condition had resolved, but that her deep venous thrombosis had not resolved, and had resulted in chronic right lower extremity venous insufficiency with intermittent pain, swelling, and ulceration. Dr. Dinenberg found appellant was capable of working in a sedentary position requiring sitting for up to six hours in an eight-hour day. In an attached Form OWCP-5c, he listed permanent work restrictions of up to one hour of walking and standing and up to 20 pounds of squatting, kneeling, and climbing for one hour.

On April 15, 2019 OWCP closed vocational rehabilitation services following an unsuccessful placement effort. It noted the customer service representative, appointment clerk and other similar positions identified by the vocational rehabilitation counselor were performed in sufficient numbers within her commuting area with weekly wages of \$511.20 to \$580.00.

In progress notes covering the period March 15 through May 9, 2019, Dr. Loan Kim Lam, a podiatrist, noted appellant's history of injury, and treatment provided. He diagnosed right leg pain, chronic venous insufficiency, right medial ankle venous stasis wound, right leg cellulitis, leg swelling, secondary lymphedema, and right leg venous stasis ulcer and inflammation.

On June 24, 2019 OWCP proposed to reduce appellant's wage-loss compensation to \$483.00 every four weeks based on her capacity to earn wages in the constructed appointment clerk position

⁴ Sedentary work, according to the DOT, involves occasionally exerting up to 10 pounds of force and sitting most of the time, but may involve walking or standing for brief periods of time. *See C.M.*, Docket No. 18-0742 (issued March 12, 2020); *G.E.*, Docket No. 18-0663 (issued December 21, 2018); *P.J.*, Docket No. 15-0295 (issued May 20, 2015)

at the rate of \$511.20 per week. It found that the position was medically and vocationally suitable and represented her wage-earning capacity. OWCP provided its application of the *Shadrick* formula finding that the weekly pay rate on the date of injury, October 17, 2014, was \$629.31 and that the current pay rate for job and step when injured was \$675.49, effective May 6, 2019. It afforded appellant 30 days to respond to the proposed reduction in her compensation.⁵

By decision dated August 23, 2019, OWCP reduced appellant's wage-loss compensation, effective September 15, 2019, based on her capacity to earn wages as an appointment clerk.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁶ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect the wage-earning capacity in his or her disabled condition.⁸ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁹ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.¹⁰ The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his or her commuting area.¹¹

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the condition.¹²

⁵ *Albert C. Shadrick*, 5 ECAB 376 (1953), codified at 20 C.F.R. § 10.403.

⁶ *C.F.*, Docket No. 19-0595 (issued September 9, 2019); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁷ *S.N.*, Docket No. 17-1589 (issued January 3, 2018); *Del K. Rykert*, 40 ECAB 284 (1988).

⁸ 5 U.S.C. § 8115(a); *K.S.*, Docket No. 19-0678 (issued October 25, 2019); *E.W.*, Docket No. 14-0584 (issued July 29, 2014); 5 U.S.C. § 8115(a).

⁹ See *M.P.*, Docket No. 18-0094 (issued June 26, 2018); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.3 (June 2013).

¹⁰ *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

¹¹ *Id.*; see also *Leo A. Chartier*, 32 ECAB 652 (1981).

¹² *Z.W.*, Docket No. 18-1000 (issued June 24, 2019); see *William H. Woods*, 51 ECAB 619 (2000).

Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹³

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by OWCP or to an OWCP wage-earning capacity specialist for selection of a position, listed in the DOT or otherwise available in the open labor market, that fits that employee's capabilities with regard to her physical limitations, education, age, and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service, local Chamber of Commerce, employer contacts, and actual job postings.¹⁴ Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*¹⁵ as codified in section 10.403 of OWCP's regulations,¹⁶ to determine the percentage of the employee's LWEC.

ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant's wage-loss compensation benefits, effective September 15, 2019, based on her capacity to earn wages in the constructed position of appointment clerk.

Dr. Durojaiye, in a February 22, 2017 Form OWCP-5c, opined that appellant was permanently disabled. However, he offered no medical rationale supporting his opinion. Where no such rationale is present, the medical opinion is of diminished probative value.¹⁷

In a report dated October 17, 2017, Dr. Owi, an OWCP second opinion physician, found that appellant was capable of working a sedentary position with restrictions including no more than six hours of sitting, no more than one hour of walking, standing, bending/stooping, and operating a motor vehicle at work, pushing no more than 40 pounds for up to 1 hour, pulling no more than 20 pounds for up to 1 hour, lifting no more than 20 pounds for up to 6 hours, no squatting, kneeling, or climbing, and 5-minute rest breaks every 30 minutes. The Board, thus, finds that OWCP properly referred appellant for vocational rehabilitation as the medical evidence established that she was no longer totally disabled due to residuals of her employment injury based on the report of Dr. Owi.¹⁸

Following appellant's referral for vocational rehabilitation services, on March 14, 2019 OWCP referred appellant to Dr. Dinenberg for an assessment of her employment-related conditions and extent of disability. In an April 5, 2019 report, Dr. Dinenberg opined that appellant's right knee condition had resolved, but that her deep venous thrombosis had not resolved, and had resulted

¹³ See *Z.W.*, *id.*

¹⁴ *Supra* note 9 at Chapter 2.816.6(a) (June 2013).

¹⁵ *Supra* note 5.

¹⁶ 20 C.F.R. § 10.403.

¹⁷ See *J.M.*, Docket No. 19-1169 (February 7, 2020).

¹⁸ *C.M.*, Docket No. 18-0742 (issued March 12, 2020).

in chronic right lower extremity venous insufficiency with intermittent pain, swelling, and ulceration. He determined that appellant was capable of working in a sedentary position requiring sitting for up to six hours in an eight-hour day. Appellant's restrictions included up to one hour of walking and standing and up to 20 pounds of squatting, kneeling, and climbing for one hour.

The Board finds that the selected position of appointment clerk is within the physical work restrictions as detailed by Dr. Dinenberg. As noted, the appointment clerk is defined as sedentary in nature, meaning that appellant would primarily sit and could walk or stand for brief periods of time. Dr. Dinenberg determined that appellant could perform sedentary work for up to eight hours a day, while sitting six hours a day, walking and standing for one hour each, a day. The Board finds that the opinion of Dr. Dinenberg was reasoned and based on a complete and accurate history and, thus, constitutes the weight of the evidence and establishes that appellant had the physical ability to earn wages as an appointment clerk.¹⁹

In progress notes covering the period March 15 through May 9, 2019, Dr. Lam, a podiatrist, noted treating appellant for right leg pain, chronic venous insufficiency, right medial ankle venous stasis wound, right leg cellulitis, leg swelling, secondary lymphedema, and right leg venous stasis ulcer and inflammation. He did not, however, address the relevant issue of whether she could perform the constructed position of appointment clerk and, thus, his opinion is of diminished probative value.²⁰

In assessing the employee's ability to perform the selected position, the vocational rehabilitation counselor considered not only appellant's physical limitations, but also considered her work experience, age, mental capacity, and educational background.²¹ In her October 29, 2018 report, she described appellant's transferable skills and completed labor market surveys for the position of appointment clerk. The vocational rehabilitation counselor noted that the appointment clerk position was sedentary in nature and available for full-time and/or part-time work in appellant's commuting area. As the rehabilitation counselor is an expert in the field of vocational rehabilitation, OWCP may rely on his or her opinion in determining whether a job is vocationally suitable and reasonably available.²²

The Board finds that OWCP considered the proper factors, including the availability of suitable employment, appellant's physical limitations, and employment qualifications in determining that she had the capacity to perform the position of appointment clerk.²³ OWCP also properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,²⁴ in determining her LWEC.

¹⁹ *C.M., id.*; *C.M., supra* note 10

²⁰ *See C.M., id.*; *M.K.*, Docket No. 18-0907 (issued February 7, 2019).

²¹ *C.M., supra* note 18.

²² *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

²³ *T.B.*, Docket No. 17-1777 (issued January 16, 2019).

²⁴ 5 ECAB 376 (1953); *supra* note 9 at Chapter 2.816.6(b) (June 2013).

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective September 15, 2019, based on her capacity to earn wages in the constructed position of appointment clerk.

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 21, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board